IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-303

WILLIAM E. COLBY, and VERNON A. WALTERS,
Petitioners,

—v.—

RODNEY DRIVER, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS

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No. 78-303

WILLIAM E. COLBY, and
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-v.-

RODNEY DRIVER, ET AL.,

Respondents.

On Writ of Certiorari To
The United States Court of Appeals
For The First Circuit

BRIEF FOR THE RESPONDENTS

STATUTE INVOLVED

Title 28, United States Code, Section 1391(e):

> A civil action in which each defendant is an officer of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides,

or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.

The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the Rules may be made by certified mail beyond the territorial limits of the district in which the action was brought.[1/]

1/ The statute, as amended in 1976, includes the following sentence after the last sentence of the first paragraph:

> Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.

In addition, the word "each" in the first paragraph is changed to "a." P.L. 94-574, §3, 90 Stat. 2721 (Oct. 21, 1976).

STATEMENT OF THE CASE

This class-action suit[2/] for damages was filed by respondents in 1975 in the federal district court for Rhode Island. The damages sought were the result of injuries inflicted by a secret CIA Project entitled HTLINGUAL, carried on from 1953 to 1973, in which the CIA, without warrants ever being issued or applied for, secretly opened, read and circulated approximately 215,000 pieces of incoming and outgoing first-class mail.[3/]

The twenty-five defendants in the suit were present or former high-ranking officials of the CIA, the Post Office Department, and other agencies of the United States who were responsible for, participated in, or concealed the mail-opening program.

2/ The district court certified the suit as a class-action under Rule 23(b)(3).

3/ HTLINGUAL is fully described in the Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activites, United States Senate Book III, pp. 559 et seq.

All the defendants, save one Rhode Island resident, filed motions to dismiss under Rules 12(b)(2), 12(b)(3) and 12(b)(4), F.R.Civ.P., alleging that they had been served outside the State of Rhode Island and that, indeed, most of them had never been in the State. The plaintiffs conceded the truth of the allegations, since they believed that Sec. 1391(e) allowed effective extraterritorial service of process against present and former government officials sued for constitutional torts committed during the course of their employment.

The district court denied the motions to dismiss, agreeing with plaintiffs' interpretation of the extraterritorial reach of Sec. 1391(e), both as to defendants in government employment at the time they were served with the summons and complaint in this suit, and as to defendants no longer in government employment when served with process.

The district court certified the question to the First Circuit under 28 U.S.C. §1292(b). The Circuit Court took jurisdiction and held that Sec. 1391(e) supplies venue and empowers the district court to exercise personal jurisdiction only against

officials who, at the time process is served upon them, are "serving the government in the capacity in which they performed the acts on which their alleged liability is based."

On cross-petitions for certiorari, defendants' petition was granted and plaintiffs' was denied.

SUMMARY OF ARGUMENT

I. The legislative history of §1391(e) indicates that it was intended to apply to damage actions against federal officers. The court below recognized that members of Congress acknowledged the statute's application to damage actions both explicitly, by insertion of the phrase "under color of legal authority," and that the Department of Justice, in a letter from Deputy Attorney General White, also acknowledged the bill's application to suits for money damages against federal officers. Subsequent to passage of §1391(e), Deputy Attorney General Katzenbach again expressed the view of the Department of Justice that it applied to such damage actions.

The petitioner's argument that the statute was "not intended to give access to the Federal courts to an action which cannot now be brought against a federal official in the U.S. District Court for the District of Columbia" confuses two separate sections of the Venue and Mandamus Act of 1962, of which §1391(e) was a part. The quoted limitation applies to the first part of the Act, which refers to expansion of mandamus jurisdiction to district courts throughout the nation. It does not apply to the second part of the Act, containing §1391(e), which provides for general expansion of venue and jurisdiction for federal courts in all suits against government officers and agencies.

The petitioners' argument that Sec. 1391(e) does not apply to damage suits against officials because such suits are not "in essence against the United States" reflects a misunderstanding of the familiar fiction of Ex Parte Young, 209 U.S. 123 (1908), and of the "color of law" doctrine, whose employment in §3191(e) necessarily means that Congress intended it to be applied in such damage actions.

Petitioners also argue that §1391(e) is inapplicable here because damage

actions against federal officials in the federal courts were unknown when §1391(e) was adopted. In fact, however, such suits were known at the time of §1391(e)'s adoption, although they were not as common as they are today. See United States v. Lee, 106 U.S. 196 (1882); Bates v. Clark, 95 U.S. 204 (1877). Barr v. Matteo, 360 U.S. 564 (159), did not bar such suits, but only provided a defense if the defendants' acts were "within the outer perimeter of [his] line of duty..." Bell v. Hood, 327 U.S. 678 (1946), explicitly left open the question whether the federal courts could entertain suits for damages against officials who violated the laws or the Constitution, and Wheeldin v. Wheeler, 373 U.S. 647 (1963), virtually foretold the outcome of the decision in Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), eight years later. Those decisions make clear that in 1960 Congress certainly would have entertained the prospect of such suits in adopting §1391(e).

Section 1391(e) provides not only venue but also personal jurisdiction in suits brought within its terms, for it specifically provides that "the summons and complaint to the officer...may be made

by certified mail beyond the territorial limits of the district in which the action took place." Such language effectively confers nationwide in personam jurisdiction upon the district courts. 2 Moore's Fed-Federal Practice ¶4.29, p. 1210; ¶4.42 [1], p. 1239.10.

II. The petitioners' argument that §1391(e), as construed below, violates the Fifth Amendment's due process clause, has no merit, as the United States, as amicus curiae, acknowledges. The government's payment of defendants' attorneys' fees removes the heaviest burden of litigation. As between the injured plaintiffs and the defendants, who are charged with violating their oath to uphold the Constitution, it would be unfair to tax the plaintiffs with the burden, inconvenience and expense of suing these widely dispersed defendants in multiple law suits around the country.

ARGUMENT

I. THE LEGISLATIVE HISTORY AND LEGISLATIVE PURPOSE OF SECTION 1391(e) INDICATE THAT IT WAS MEANT TO APPLY TO DAMAGE SUITS AGAINST FEDERAL OFFICERS FOR ACTIONS TAKEN UNDER COLOR OF THEIR OFFICIAL POSITION.

A. Legislative History[4/]

The Court below examined the legislative history of §1391(e) in detail and concluded that Congress intended that it apply to damage actions by citizens against federal officials in their individual capacity for injuries arising from acts performed under color of law:

> The legislative history of §1391(e) is at best ambiguous, but there are indications that the drafters of the legislation understood that the act might apply to actions such as this

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4/ Section 1391(e) was enacted as part of the Mandamus and Venue Act of 1962. The legislative history is contained in H.R. Rep No. 536, 87th Cong., 1st Sess. (1961) [hereinafter H.R. Rep.]; S. Rep. No. 1992, 87th Cong., 2d Sess. (1962), reprinted in 1962 U.S. Code Cong. and Adm. News, p. 2784 [hereinafter S. Rep.].

> one and were not sufficiently bothered by that possibility to prevent it. This act originated as H.R. 10089, 86th Cong., 2d Sess. (1960). That bill was limited to officers acting in their official capacity, and its author, Representative Budge, explained that it was intended to meet the narrow problem described above [suits for mandamus]. Hearing Before the Committee in the Judiciary (Subcommittee No. 4), 86th Cong., 2d Sess. 2-4 (May 26 and June 2, 1960) [hereinafter cited as Hearing]. The hearings on the bill before a subcommittee of the Committee on the Judiciary demonstrate that at least some members of that subcommittee did not want the bill limited to a narrower purpose. For instance, at one point Mr. Drabkin, the subcommittee's counsel stated, "I think what this bill is concerned with doing is dealing with mandamus and also dealing with petitions for review which may not properly be brought now because of some venue defect." Congressman Dowdy responded, however, "I asked to be sure it was not limited to that." App. 9a-10a.5/

New language was then suggested for the specific purpose of expanding §1391(e)'s forerunner to cover actions taken "under color of legal authority:"

> The desire to reach a variety of causes of action prompted the first mention of the "under color of legal authority"

5/ "App." refers to the Appendix in the Petition for a Writ of Certiorari.

> phrase. After a discussion whether certain kinds of acts would constitute official action or not, Mr. Drabkin proposed, "Suppose in order to take care of a body of law which seems to say that when a government official does something wrong he is acting in his individual capacity, we added the following language -- 'acting in his official capacity or under color of legal authority." That would not bring in the type of situation in which a postman, after he had gone home for the night, proceeded to run over somebody's child." Id. at 61-62. This is the first appearance of the "under color" language, and its context suggests that it was understood to exclude only those personal damage actions arising from purely private wrongs. App. 10a-11a.

As H.R. 12622, 86th Cong. 2d Sess. (1960), the bill was then introduced to provide both mandamus jurisdiction and venue for expanded actions against federal officials "acting under color of legal authority." The House passed that provision but the Senate did not act on it.

A new bill, H.R. 1960, 87th Cong., 1st Sess. (1961), was introduced in the following year. The Justice Department read the new language as expanding venue and personal jurisdiction to Federal officers sued for damages and had second thoughts about the proposal. This prompted

then Deputy Attorney General Byron White's letter to Congress, referred to by the United States in its brief, p. 43. Though the United States would have the Court believe that that letter supports its proposed interpretation of §1391(e), the First Circuit explained the letter's actual significance:

> This bill was reintroduced in the next Congress as H.R. 1960, 87th Cong., 1st Sess. (1961). The Department of Justice, in a letter from then Assistant [sic] Attorney General Byron White suggested more changes. The letter recognized that section 2 of the bill, the new §1391 "covers an entirely different subject" than section 1, the new 28 U.S.C. §1391, and that unless clarified §1391(e) might apply to "suits for money judgments against officers." S.Rep. No. 1992, 87th Cong., 2d Sess. (1962), 1962 U.S. Code Cong. & Admin. News, pp. 2784, 2789 .... Though acting on other suggestions from that letter, Congress did nothing to eliminate personal damage actions. In fact, both the House and Senate reports state, "The venue problem also arises in an action against a Government official seeking damages from him for actions which are claimed to be without legal authority but which were taken by the official in the course of performing his duty." House Report, supra, at 3; Senate Report, supra, 1862 U.S. Code Cong. & Admin. News at 2786 (emphasis added). App. 11a-12a.

Indeed, after passage of §1391(e), the Justice Department itself read the law to include in its scope damage actions against federal officials. In his memorandum to United States Attorneys, dated January 18, 1963, Br. for the United States, p. 49 n. 34, Deputy Attorney General Katzenbach explained the provision as follows:

> The venue provision is applicable to suits against Government officials and agencies for injunctions and damages as well as suits for mandatory relief. By including in the venue provision the phrase "or under color of legal authority," the statute makes the expanded venue applicable not merely to actions for mandatory relief but also to actions in which the defendant Government official is alleged to have taken or is threatening to take actions beyond the scope of his legal authority although purporting to act in his official capacity. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579; Philadelphia Co. v. Stimson, 223 U.S. 605. As an example, suits for damages for alleged libel or slander by Government officials (which the Department defends on the ground that statements made by a Government official within the scope of his authority are absolutely privileged; Barr v. Matteo, 360 U.S. 564; Howard v. Lyons, 360 U.S. 593) fall within the venue provisions of this statute. This statute has no application to a suit

> brought against a Government official with respect to an act in the performance of which he purported to act as a private individual, not as an official. The Department does not, of course, represent Government officials in such cases.

The United States admits that these statements by Mr. Katzenbach are irreconcilable with its proposed construction of §1391(e) but invites the Court to view them as "wrong." To the contrary, they are right, because they are harmonious with both the statute's natural construction and statements of Congressmen at the earlier hearing.

The First Circuit found further support for its views in the 1976 amendments to §1391(e), which added a new sentence to the end of the first paragraph allowing non-government officials to be joined as defendants in an action with government officials reached by §1391(e). "It would make little sense to join someone who is not an officer if the suit were limited to an action in the nature of mandamus. Therefore the suit Congress was contemplating must be aimed at acts that can give rise to liability for private remedies," the Court observed. App. 14a.

In Briggs v. Goodwin, 569 F.2d 1 (D.C. Cir. 1977), cert. granted sub nom. Stafford v. Briggs, No. 77-1545 (January 15, 1979), the District of Columbia Circuit reached the same conclusion as the First Circuit concerning §1391(e)'s scope following its own detailed analysis of the provision's legislative history. The court found there (569 F.2d at 5) that:

> The purpose of the new bill was "to provide readily available, inexpensive judicial remedies for the citizen who is aggrieved by the workings of Government, but who would previously have been compelled to sue in the District of Columbia by the pre-existing venue provisions," which were deemed "contrary to the sound and equitable administration of justice." And the House Report specifically noted that "[t]he venue problem also arises in an action against a Government official seeking damages from him for actions which are claimed to be without legal authority but which were taken by the official in the course of performing his duty." [quoting from H.R. Rep. No. 1936, 86th Congress 2d Sess. (1960) 2-3...]

The court explained (569 F.2d at 5):

> This colloquy between the Department of Justice and the legislative draftsmen demonstrates the legislature's comprehension and resolution of the issue before us. The conscious addition by Congress of language designed to extend Section 1391(e) to suits for damages against federal officials acting

> under color of legal authority, coupled with its adherence to that language despite highly respectable protest, manifests beyond peradventure an intent to broaden venue in just such suits. Our duty is to hearken to the will of Congress as expressed, and the statutory mandate is clear.

To rebut this very persuasive legislative history, Petitioners rely heavily on two isolated phrases in the legislative history. The first states that the new law was "not intended to give access to the Federal courts to an action which cannot now be brought against a Federal official in the U. S. District Court for the District of Columbia." Petitioner's Brief at 13. The second phrase is that the law was intended to cover actions which are "in essence against the United States." Petitioner's Brief at 16. Petitioners' main argument is built upon inferences which they would have the Court draw from these phrases.

The simple explanation of the first phrase is that it was directed to the expansion of subject matter jurisdiction to federal district courts in mandamus actions. Section 1391, the mandamus provision, and §1391(e) were enacted together in the Venue and Mandamus Act of 1962. But

§1391(e) has a vitality wholly apart from the mandamus statute, which becomes readily apparent when care is taken to distinguish the commentary directed to §1361 in its mandamus context from that which concerns §1391(e) in the context of other civil actions.

The report of the Department of Justice on the proposed legislation (H.R. 1960) expressed concern regarding Section 1 of the Mandamus and Venue Act of 1962 which was enacted as §1361. Deputy Attorney General Byron White wrote to Senator Eastland:

> While the stated purpose of section 1 is to extend the mandamus powers of the District Court for the District of Columbia to the several district courts throughout the Nation, the language of the section is dangerously broad. Courts interpreting the mandate to require a Federal officer "to do his duty" might find a much greater power in the District of Columbia court to which the proposed statute does not refer explicitly or implicitly. We think it essential that the section refer to the mandamus power and specifically limit its exercise to ministerial duties owed the plaintiff. S. Rep., at 2788-89.

In response to the Department's concerns, the Senate Committee Report emphasized that the grant of subject matter jurisdiction contained in §1361 was no broader than the

subject matter jurisdiction over mandamus actions then available in the District Court for the District of Columbia. Id. at 2785, 2787. It is that issue of subject matter jurisdiction under §1361 to which the limitation to actions which could only have been brought in the District of Columbia applies, not any aspect of the venue and service features of §1391(e).

Petitioner's reliance (Br. 14) upon Liberation News Service v. Eastland, 462 F.2d 1379 (2nd Cir. 1970), and National Resources Defense Council v. T.V.A., 459 F.2d 255 (2nd Cir. 1972), on this issue is unavailing. The holding of Liberation News Service was that §1391(e) did not apply to members of Congress or to Congressional employees in any case, and, in flat opposition to petitioners' footnote 4, the court also stated that "if the Section were applicable, it would indeed supply both venue... and jurisdiction over the persons of the Senators and their counsel." 426 F.2d at 1382. National Resources Defense Council held that the Tennessee Valley Administration, because of a separate statute, §8(a) of the T.V.A. Act, could be sued only in the Northern District of Alabama or where it

did business, and that the other statute was not supplanted by §1391(e). That holding, as the court below pointed out, is nothing more than an application of the provision in §1391(e) that it applies "except as otherwise provided by law." App. 7a.

The second phrase upon which petitioners so heavily rely - actions "in essence against the United States" - is, admittedly, more ambiguous. Understanding that phrase requires reference to the familiar fiction contained in Ex Parte Young, 209 U.S. 123 (1908), and to the meaning of the usage "under color of legal authority," which appears in §1391(e).

The Ex Parte Young fiction has been indulged in order to circumvent the doctrine of sovereign immunity. It characterizes the illegal or unconstitutional acts of government officials done under color of legal authority as their own, rather than the state's. As it was specifically put in Ex Parte Young:

> If the act which the [official] seeks to enforce be a violation of the federal Constitution, the officer in proceeding under such an enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his

> official or representative character and is subjected in his person to the consequences of his individual conduct. 209 U.S. at 159-60.6/

The fiction, and its function, are explicitly acknowledged in §1391(e) by use of the language "under color of legal authority" as a term or art, as explained in the legislative history. H.R. Rep. 4. The Katzenbach memorandum, supra, is explicit in its understanding that inclusion of the phrase "under color of legal authority," in §1391(e) authorizes suits for damages against federal officers who violate statutes or the Constitution.

A brief review of the history of the phrase "under color of legal authority" shows why this is so. The most significant context in which the "under color of" legal authority notion appears is the Civil Rights Act of 1871, now 42 U.S.C. §1983,

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6/ Though Ex Parte Young was an action to enjoin a state official, the fiction has been transported to apply to federal officials, Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682 (1949), and to actions for money damages, Monroe v. Pape, 365 U.S. 167 (1961)(state officials); Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971)(federal officials).

the statute which authorizes suits against state officials who violate constitutional rights "under color of any statute, ordinance, regulation, custom or usage, of any State." The same language also appears in 18 U.S.C. §242, the criminal counterpart of §1983. The interpretation of these sections involved the question whether the illegal acts committed by state officials "under color of" law, which would make them liable to civil or criminal penalties in the federal courts, were sanctioned explicitly by state law or not. The defendants' position in those disputes was that the federal statutes were meant to apply only to illegal or unconstitutional acts by state officials which were authorized by state statute, not to acts that violated state as well as federal statutory or constitutional law. But that argument was decisively rejected by this Court. See United States v. Classic, 313 U.S. 299 (1941); Screws v. United States, 325 U.S. 91 (1945); Williams v. United States, 341 U.S. 97 (1951); Monroe v. Pape, supra, and Bivens v. Six Unknown Named Agents, supra. The Court has held instead that acts committed "under

color of" law, for which damages could be recovered personally against the offending official, included acts committed with apparent state authority as well as actual state authority. As the Court held in Monroe v. Pape, supra at 194, a year before §1391(e) was enacted, adopting and reaffirming the decision in United States v. Classic, supra, at 326:

> Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken "under color of" state law.

In short, whenever this Court has considered suits against government officials for acting in excess of constitutional authority, it has utilized the "under color of law" analysis of Ex Parte Young and United States v. Classic to enable the judiciary to engage in effective judicial review of allegedly unconstitutional activity without impinging on sovereign immunity. In applying "under color of law" this Court has consistently recognized it as the analytical device by which agents of the sovereign, such as the defendants here, are made to operate within - and not above - the law.

This is not a suit involving personal injury to the plaintiffs resulting from an automobile accident which occurred while Messrs. Colby or Walters were driving their car on a summer holiday. If it were, we would not be here.[7/] This is a suit for constitutional torts inflicted upon the plaintiffs in the course of the defendants' official employment, that is, under color of their legal authority. See Bivens v. Six Unknown Named Agents, supra. Under these circumstances, §1391(e) applies.[8/]

7/ As the Congress recognized in stating that "There is no intention [in adopting §1391(e)] to alter the venue requrements of Federal law insofar as suits resulting from the official's private actions are concerned." H.R. Rep 4.

8/ The United States makes much of Schlanger v. Seaman, 401 U.S. 487 (1971), which declined to extend §1391(e) to habeas corpus cases. But as the Supreme Court held, although "habeas corpus is technically 'civil,' it is not automatically subject to all the rules governing ordinary civil actions." Supra at 490 n.4. And as pointed out by the district court below (App. 31a-32a), whose view on the subject was adopted by the First Circuit (App. 8a n.14), §1391(e) applies "except as otherwise provided by law," and "the [Supreme] Court found in Schlanger that the habeas corpus statute, 28 U.S.C. §2241, did indeed provide otherwise. Therefore

(FN 9 continued on next page)

If this suit were not "in essence" against the United States, the defendants could not be held liable for violating the Constitution, since the Constitution imposes limits only upon the government which, in turn, can only act through its officers.

B. Damage Suits Against Federal Officials Were Known, If Not Frequent, Prior to 1962.

The Petitioners and the United States both argue that §1391(e) does not apply in the case at bar because, as petitioners put it, "...when Section 1391(e) was enacted, damage suits such as this action brought in essence against federal officials were unknown in the federal courts" (Br. 18). The United States, a bit more carefully, asserts only that, "in most cases there was no right of action in federal court" (Br. 19), that such suits were "all but impossi-

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§1391(e) did not apply, and a district court's reach of in personam jurisdiction in habeas corpus actions was limited to the traditional territorial jurisdiction of the district courts."

ble" (Br. 20), and that "few persons had federal rights of action for violations of constitutional or statutory rules" (Br. 22-23). In other words, such suits were not unknown, although not as common as they are today. We do not disagree. We believe, however, that such suits were common enough, and likely enough, that Congress, in enacting §1391(e), intended that they be included within its reach.9/

9/ That such actions were considered common, or likely, is evidenced by a major 1957 Harvard Law Review article. Referring to actions for money damages against government officers, the article stated, "A government officer who acts without authority is thus subject to the same legal rules as any private person. Remedies are provided by the common law, by statute, and perhaps in equity by the Constitution." As examples, the Note refers to United States v. Lee, 106 U.S. 196 (1882), an action of ejectment against soldiers with no authorization for their presence on property; and Bates v. Clark, 95 U.S. 204 (1877), a trespass action for damages against soldiers who seized property without authority. Developments in the Law, Remedies Against the United States and its Officials, 70 Harvard L. Rev. 827, 832 (1957).

Actions against federal officers for violations of state common law duties were, as the United States concedes, "fairly common" by 1960 (Br. 21). Such actions could be brought in federal court when diversity existed between the parties. Therefore, as the United States admits again, at the time of §1391(e)'s enactment "Federal courts entertained actions for damages against federal officials in a variety of contexts," based on diversity or federal question jurisdiction (Br. 22-23).

Having thus admitted that in 1960 Congress had knowledge of such damage suits against federal officials, the United States attempts to obscure the significance of the fact by emphasizing the defenses available to the federal defendants, relying mainly on Spalding v. Vilas, 161 U.S. 483 (1896), and Barr v. Matteo, 360 U.S. 564 (1959). But this diversionary effort necessarily is unavailing. The most the United States can assert is that "the federal employee usually could abort the suit at the outset by relying on official immunity" at the time of §1391(e)'s enactment. (Br. 23)(emphasis added). Usually,

however, is not the same as always. See, e.g., Colpoys v. Gates, 118 F.2d 16 (D.C. Cir. 1941), which refused to dismiss a libel action against the United States Marshal for the District of Columbia on the ground that the immunity defense pronounced in Spalding v. Vilas did not protect the defendant.

Despite the United States' heavy reliance on Barr v. Matteo, decided only one year before Congress began to consider the predecessor bill to §1391(e), that case did not foreclose all actions for damages against federal officers. That case held that the defendant was protected because his public statement "was within the outer perimeter of [his] line of duty..." (360 U.S. at 575), leaving open the real prospect of a successful suit where the federal official had acted beyond the outer perimeter of his line of duty. The same is true of Bell v. Hood, 327 U.S. 678 (1946), and Wheeldin v. Wheeler, 373 U.S. 647 (1963). Indeed, the latter decision can fairly be read as foretelling the result in Bivens v. Six Unknown Named Agents, supra, where the Court explicitly recognized constitutional torts, for it is reasonably clear in Wheeldin that the

Court might have found a cause of action arising out of the Constitution if it had found, which it did not, that the actions alleged against the defendant had violated the Fourth Amendment.

Present purposes do not require us to decide too closely exactly what the status of the doctrine of damage actions against federal officials was in this Court in 1960. The question is simply whether Congress could have had such suits in mind when it began to re-think §1391. Clearly it could have, and as the court below found, after examining the Hearing Before the Committee on the Judiciary (Subcommittee No. 4), supra, "there are indications that the drafters of the legislation understood that the act might apply to actions such as this one and were not sufficiently bothered by that possibility to prevent it" (App. 9a). At the Hearing, the subcommittee counsel had stated his belief that the bill was meant to deal only with mandamus and other petitions for review "which may not properly be brought now because of some venue defect" (Hearings 32), but Congressman Dowdy suggested that it ought to apply to "all suits" (Id. at

32), and Congressman Poff said that "we want to see that the citizen has the right to efficient redress, irrespective of the legal technicalities and niceties with which we lawyers are all prone to deal" (Id. at 55). In a remark of particular importance, Congressman Whitener observed that "it would be an utter injustice if a citizen of California couldn't sue a Congressman for slander in California" (Id. at 55), thus demonstrating an awareness that there would still have been a specific use for a provision like §1391(e) even assuming arguendo that there were no relevant federal causes of action available to plaintiffs before Bivens.

An example of the problem that concerned Mr. Whitener would be the hypothetical case of a California resident libeled by a federal official stationed in Virginia. Prior to passage of §1391(e), suit could have realistically been brought only in Virginia, where the official could be personally served. This was so because even if venue were proper in the federal district court in California under §1391(a) (providing for venue where plaintiff resides in a diversity action), there was no provision

in §1391(a) for extraterritorial service of process. Section 1391(e) changed that result. After its adoption, venue in the case posited would have been proper in federal district court in California, and the court would be empowered to exercise personal jurisdiction over the defendant because of the provision allowing nationwide service of proces. Thus, §1391(e) served the purpose of allowing a plaintiff to bring suit in his federal district court even for common law torts where the defendant was an out-of-state federal official. And clearly that is what Congress intended.

The United States misleads the Court by its unequivocal assertion that "These hearings demonstrate the bill was intended to apply only to judicial review of administrative action, and not to provide venue in damage actions against government officials" (Br. 27). The hearings do no such thing. Although they are somewhat ambiguous, they do show beyond a doubt that some members of the enacting Congress intended to use §1391(e) to simplify the process by which private citizens could seek money damages personally against federal officers who injured them.

C. Section 1391(e) Provides Both Venue and Personal Jurisdiction

Petitioners argue that §1391(e) does not confer personal jurisdiction. This claim is contradicted by the statute's language, purpose and legislative history, which establish that it is a member of that class of statute contemplated by Rule 4(f), F.R. Civ.P., allowing effective service of process beyond the territorial limits of the state within which the district court sits. By its plain words the statute provides for venue in any civil action in which a defendant is "an officer or employee of the United States or any agency there," and provides that "the summons and complaint to the officer or agency...may be made by certified mail beyond the territorial limits of the district in which the action was brought." There is nothing in the text of the statute distinguishing between actions against federal officials brought for injunctive relief or, as in this case, for damages. The other venue provisions in §1391, such as subparagraphs (a) and (b), are worded identically and also clearly apply to damage actions. By the plain words of the statute, Congress provided for more generous venue provisions, and

for personal service and in personam jurisdiction to make those new venue provisions effective. It would have been futile to provide for expanded venue without taking the proper legislative step to bestow personal jurisdiction upon the district courts as well.

The court below agreed that Congress intended to allow service of process anywhere in the United States by certified mail: "Not only does our reading of the statute command such an interpretation, but we are persuaded that this is precisely what Congress intended." App. 16a. This interpretation is the only one that would make sense out of the expanded venue provisions: "Congress recognized that it would serve no purpose to broaden venue without also broadening service of process. . . Thus to the same extent that §1391(e) supplies venue, it supplies the mechanism to secure personal jurisdiction" App. 17a. The District of Columbia Circuit in Stafford also agreed that the provision for extraterritorial service of process fits within the purpose of the venue changes (569 F. 2d at 7-8):

> . . . the House Report on Section 1391(e) correctly noted that its expansion of venue would be of little avail unless coupled with a modification of service demands then levied by the Civil Rules. Thus, while the amended section retains the rules intact for service within the forum district it empowers the district courts to make valid service outside the district whenever venue lies by virtue of Section 1391(e). It also authorizes service by certified mail in such situations whenever service can be effected only beyond the boundaries of the forum district.
>
> Nowhere is there any intimation that these changes were to affect some cases controlled by Section 1391(e) and not others, and indeed any exception would be difficult to justify. That venue exists in a particular district would hardly console a plaintiff unable to serve officials who, though responsible for his plight, had withdrawn beyond the limits of effective service. And Congress must not have been content to rely simply on state long-arm statutes, for it chose to supplement them in the category of cases encompassed by Section 1391(e) by providing extraterritorial service of its own device. We find the service effected here to be fully within the ambit of congressional contemplation.

And the House Committee Report accompanying §1391(e) itself states:

> In order to give effect to the broadened venue provisions of this bill, it is necessary to modify the service requirements under the

> Federal Rules of Civil Procedure insofar as they apply to actions made possible by this bill. Rule 4(f) restricts effective service to the territorial limits of a State in which the district court is held unless a statute specifically provides for it to go beyond the territorial limits of that State. Since this bill is designed to make a Federal official or agency amenable to suit locally, the bill provides that the delivery of the summons and complaint to the officer or agency may be made by certified mail outside of the territorial limits of the district in which the action is brought. H.R. Rep. 4.

Moreover, Professor Moore is explicit in stating that §1391(e) not only expands venue but also empowers the district courts to exercise in personam jurisdiction extraterritorially. 2 Moore's Federal Practice ¶4.29, 1210:

> [Sec. 1391(e)] realistically broadens venue in any civil action (not just mandamus proceedings) where each defendant is a federal officer, employee or agency and is sued for acts done in his official capacity or under color of legal authority; and provides for extraterritorial service of process, if necessary, in such an action.

See also 2 Moore's Federal Practice ¶4.42[1], p. 1293.10.

Numerous other courts are in agreement that §1391(e) is "a statute of the United States" authorizing extraterritorial service of process within the meaning of Rule 4(f), and thus supplying personal jurisdiction over non-resident defendants. See Lowenstein v. Rooney, 401 F. Supp. 952, 961-62 (S.D.N.Y. 1975); United States v. MacAnich, 435 F. Supp. 240 (E.D.N.Y. 1977); Crowley v. United States, 388 F. Supp. 981, 987 (E.D. Wisc. 1975); Environmental Defense Fund, Inc. v. Froehlke, 348 F. Supp. 358, 364 (W.D. Mo. 1972), aff'd on other grounds, 477 F. Supp. 1369, 1373 (E.D.N.Y. 1970); Maceas v. Finch, 324 F. Supp. 1252, 1254-55 (N.D. Cal. 1970).

II. AS CONSTRUED BY THE COURT BELOW, SECTION 1391(e) IS CONSTITUTIONAL

In the court below, petitioners argued that the "minimum contacts" test should be applied to them to determine the applicability of §1391(e). In the face of universal opinion that that test applies only to assertions of state rather than federal court jurisdiction,[10] they have now abandoned that argument and argue here that application of §1391(e) to their activities is so unfair as to violate due process. Petitioner's central claim is that §1391(e), as construed below, imposes an "intolerable burden on their right to defend." (Br. 27). The claim has no merit.[11]

The Court below properly disposed of this argument by noting that 28 U.S.C. §1404(a) allows transfer of cases "for the convenience of parties and witnesses, in the interest of justice...," and that "officers of the federal government...can anticipate that their official acts may

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10/ See App. 19a-20a; Mariash v. Morrill, 496 F.2d 1138, 1143 (2d Cir. 1974); Fitzsimmons v. Barton, 589 F.2d 330 (7th Cir. 1979).

11/ The United States agrees. Br. 2, n. 1.

affect people in every part of the United States."

Beyond that, we believe there are additional reasons why it is not unfair to allow citizens to seek redress in their home jurisdictions against federal officers who are charged with violating constitutional and statutory prohibitions.

The principal burden of defending any lawsuit is the expense of employing counsel. But there is no burden on the individual government official in this and other similar cases because the Justice Department has undertaken to pay for the private attorneys retained by all the defendants in such cases.[13] That arrangement was originally announced, for this case, in a Department of Justice press release dated December 12, 1975, and has

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12/ This fact also destroys the tendentious argument made by the United States (Br. 54-56) about the hardships that this litigation imposes on the defendants, for its three-page litany of suffering and toil neglects to mention that the government is paying the defendant's attorneys' fees. It also overlookds the fact that the defendants would suffer essentially the same inconveniences were the plaintiffs to bring suit where the defendants reside.

since been formalized in 28 C.F.R. 50.15 and 50.16 (App. 100a), which provide that all present or former federal employees will be supplied government or private counsel in suits involving "actions performed within the scope of their employment." If private counsel is retained because of the possibility of criminal action or because of the possibility of conflict between co-defendants, or for any other reason, financial arrangements are made with private counsel. Although hourly fee or hour-per-month limitations may be imposed, and the fees contracted for may not always be the full fees normally charged by the particular private attorney retained, it is nonetheless clearly contemplated that the amounts appropriated will be sufficient to supply counsel of the same quality as the Justice Department would provide itself. It is equally clear that the government official is not expected to contribute any of his or her own money toward legal fees.

In addition, the due process calculation, if there even is one to be made here, has to take into account the equities between the plaintiffs and the defendants. Here, the plaintiffs allege that injury of constitutional scope was inflicted

upon them by defendants who held responsible federal posts, and who had taken an oath to support and defend the Constitution. Yet, while in office, they knowingly violated the Constitution, with repercussions felt by citizens from coast-to-coast. It cannot be unfair to require them to answer for those constitutional incursions at a place convenient to a citizen who was injured by the illegal acts, particularly when the defendants' legal expenses are provided by the United States Treasury. The true unfairness in this situation would be to tax the plaintiffs with the burden, inconvenience and expense or running down their transgressors in multiple lawsuits to vindicate their rights, rather than allowing the matter to be settled in a single forum convenient to the victims.

In construing §1391(a), the Court should view it as a "plaintiff's provision," designed to "remove the virtually impenetrable barrier of procedural entanglement which has so frequently provided the government with de facto immunity from lawsuits." Powelton Civic Home Owners' Ass'n. v. Dept. of Housing and Urban Development, 284 F. Supp. 809, 833 (E.D. Pa. 1968). Congress made clear that this injustice to blameless private citizens

far outweighs the inconvenience of requiring the Justice Department to defend federal officials and employees in local forums:

> ...[W]here a citizen lives thousands of miles from Washington...where the cause of action arose elsewhere, to require that the action be brought in Washington is to tailor our judicial processes to the convenience of the Government rather than to provide readily available, inexpensive judicial remedies for the citizen who is aggrieved by the workings of Government. S. Rep. at 2786.

Thus, Congress has already decided where fairness lies.

CONCLUSION

For the reasons stated above, the decision of the United States Court of Appeals for the First Circuit should be affirmed.

Respectfully submitted,

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